No. 16008

In the United States Court of Appeals for the Ninth Circuit

SKOKOMISH INDIAN TRIBE, APPELLANT

v.

E. L. FRANCE, TRUSTEE, ET AL., APPELLEES

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The court's oral decision (R. 129-131) is not reported. An earlier memorandum opinion of Judge Lindberg (R. 47-53) is not reported.

JURISDICTION

This is an appeal filed January 6, 1958 (R. 134) from an order dismissing, for lack of jurisdiction, a suit instituted by the Skokomish Indian Tribe (R. 132-134). The complaint asserted that jurisdiction existed because plaintiff was an Indian Tribe, the rights demanded arose out of a treaty with the

United States, and more than $3,000 was involved (R. 4). The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1291.

QUESTIONS PRESENTED

1. Whether the United States has consented to be joined as a party to this quiet title suit instituted by an Indian Tribe.

2. Whether the United States is so essential a party that such a suit may not proceed in its absence.

STATEMENT

The Skokomish Indian Tribe on December 3, 1948, filed a complaint to quiet title to lands alleged to constitute tidelands bordering the plaintiff's reservation (R. 4-33). Claimed fishing rights were also involved. The United States was named as a party defendant because of possible interest of the Bonneville Power Administration in one of the tracts (R. 31). However, by stipulation stating that that Administration had no interest (R. 33-35), the case was dismissed as to the United States (R. 36).

Motions to dismiss were made by the State of Washington and by many defendants who claimed under deeds and leases from the State (R. 35, 37-38, 39-46). These were denied by Judge Lindberg by a memorandum opinion dated July 16, 1952 (R. 47-53). A pre-trial order entered October 1, 1956, by Judge Boldt revealed several jurisdictional objections (R. 93, 96, 99, 100, 102). At a hearing on June 12, 1957, Judge Boldt expressed doubt about jurisdiction and suggested that perhaps the questions

might be resolved by joining the United States as a party (R. 117-124). Appellant thereupon moved to join the United States as a party plaintiff (R. 125-126). By memorandum filed August 1, 1957, the United States Attorney appeared specially and challenged the motion for lack of jurisdiction stating, however, that the United States was not a necessary party (R. 127-128). At a hearing on October 2, 1957, the court expressed the view that the United States could be made a party "by implication" but that it was an indispensable party (R. 130). Both of these questions, it said, should be resolved by a loftier tribunal and to permit review prior to lengthy trial, it denied the motion to join the United States, dismissed the case as to the State for lack of consent to suit and dismissed the rest of the case for lack of jurisdiction (R. 131-133).

ARGUMENT

I

The United States Cannot Be Joined As A Party To This Case Without Its Consent

Appellant's brief contains a lengthy discussion of the legal relationship between the United States and Indian Tribes (Br. 7-29). Constantly asserted is the idea that it is the guardian and trustee of the tribe, is under a duty to bring this suit and hence may compulsorily be joined as a party plaintiff (e.g., Br. 12-13, 15, 16, 19, 20, 21, 22, 24, 44). We disagree with many of these assertions and with appellant's interpretation of many of the cases cited. For example, while the Federal-Indian relationship

has been said many times to "resemble" that of guardian and ward (e.g., Br. 14), the legal obligations of a true guardianship do not prevail. See *Sioux Tribe of Indans* v. *United States*, 146 F.Supp. 229, 237-238 (C.Cls. 1956).[1] Cf. *McGugin* v. *United States*, 109 F.2d 694 (C.A. 10, 1940) holding that a suit by the United States to collect funds belonging to Jackson Barnett illegally transferred did not abate upon the death of Barnett. It is unnecessary and, we believe, inappropriate here to discuss at length what obligation the United States may owe to appellant tribe. In any event, compulsory joinder to this action would violate the sovereign immunity from suit.

A court has jurisdiction of the United States only so far as Congress may have consented. *United States* v. *Shaw*, 309 U.S. 495, 500 (1940); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). In *United States* v. *U. S. Fidelity Co.*, 309 U.S. 506 (1940) the court said (p. 514): "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void". In *Choctaw and Chickasaw Nations* v. *Seitz*, 193 F.2d 456 (C.A. 10, 1951), cert. den. 343 U.S. 919, the precise problem of this case was presented when the tribes sought to quiet title to certain lands and the defendants objected that the United

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[1] In *Federal Indian Law*, (Dept. of Int. 1958) after summarizing the elements of a common law guardianship it is said (p. 557): "It is clear that this relationship does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships".

States was a necessary party. The Tribe sought to join the United States as a "third party defendant". The court of appeals affirmed an order dismissing the action as to the Government on the ground that it had not consented to be sued. This and the other cases cited above make it clear that sovereign immunity is the same whether Indians or other parties are involved.

Nor can a distinction be made on the ground that here it is sought to join the United States as a party plaintiff. The immunity extends to any attempt to adjudicate the Government's rights whether it takes the form of a cross-claim (*United States* v. *U. S. Fidelity Co., supra*) *Ill. Cent. R.R. Co.* v. *Public Utilities Comm.*, 245 U.S. 493, 504-505 (1918), or otherwise. Moreover, except for some special cases, Congress has given the Attorney General exclusive authority to determine when and where suits may be instituted in the name of the United States. *United States* v. *California*, 332 U.S. 19, 26-29 (1947); *United States* v. *Hall*, 145 F.2d 781 (C.A. 9, 1944), cert. den. 324 U.S. 871; *Booth* v. *Fletcher*, 101 F.2d 676, 681-682, (C.A. D.C., 1938), cert. den. 307 U.S. 628; *New York* v. *New Jersey*, 256 U.S. 296, 307-308 (1921); *Castell* v. *United States*, 98 F.2d 88, 91 (C.A. 2, 1938), cert. den. 307 U.S. 628. The courts have not been vested with any power to review his decision in this regard. See *Booth* v. *Fletcher*, *supra*, pp. 681-682. In addition, even if it be assumed that there is some authority to review the Attorney General's decision, the case would have to be filed in the District of Columbia courts which

alone have jurisdiction over cabinet officers acting in their official capacities. *Daggs* v. *Klein*, 169 F.2d 174, 176 (C.A. 9, 1948); *Truman Fertilizer Co.* v. *Larson*, 196 F.2d 910, 911 (C.A. 5, 1952), and cases there cited.

Federal Rule of Civil Procedure 19 does not alter these principles. It is plainly limited to those persons over whom the court has jurisdiction "as to both service of process and venue" (Br. 27). The authority to make rules of civil procedure for exercise of the court's jurisdiction "is not an authority to enlarge that jurisdiction", hence a consent to sue the United States cannot be found in the Federal Rules. *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). The court's refusal to join the United States as a party was, we submit, plainly correct.

II

The Case May Proceed In The Absence Of The United States

In *Choctaw and Chickasaw Nations* v. *Seitz*, 193 F.2d 456 (C.A. 10, 1951), cert. den. 343 U.S. 919, the court held that the fact that the United States would not be bound by the judgment was not sufficient reason to deny the Indian Tribe the right to assert its claim to certain property. The court there said (p. 461): "We conclude that a final decree determining the title and right to possession as between the Nations and the defendants would not leave the controversy in a situation inconsistent with equity and good conscience". We submit that this decision should be followed by this Court. Cf. *Fed-*

eral Indian Law, Dept. of the Interior, 1958, pp. 336-337.

CONCLUSION

For the foregoing reasons, we submit that the order should be affirmed so far as it refuses to join the United States as a party but should be reversed so far it holds the United States to be an indispensable party. Comment by us on other jurisdictional questions that may be presented seems inappropriate.

Respectfully,

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